

Earl of Shaftsbury's GRAND-JURY VINDICATED

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From the Aspersions cast on them in the late Address from some of the
Middle-Temple, London.

S I R,

HAVING little diversion besides the reading of *Gazets* and other *News-Pamphlets*, that of Feb. 20. 1681. came to me of course, which tells us of a *Declaration* Presented to His Majesty by *Edm. Saunders Esq;* *Councellor at Law*, and several other Gentlemen of the *Middle-Temple*; and Signed by the *Gentlemen* of that *Society*: This indeed surprised me at first: but finding no more of the *Ancients* of the *Bar* named, nor the *Bench* so much as mention'd; I concluded presently that 'twas the *Akt* only of some *Good-fellows* of the *House*, who being met at a *Tavern*, and better filled with *Wine* than *Law*, thought themselves fit to give an Opinion of all things and persons; and presuming that Number would add weight to their Paper, stiled themselves *The Gentlemen of the Society*; to look big in a *Gazette*, how unvaluable soever in their *Chambers*. Nor is it to be wondred at, If a *Low-Birth*, narrow *Fortune*, and *Debauched Life*, do so slavishly expose some men to any great *Temptation*, as to undervalue their *Profession*, and abandon *Religion*. The *Laws* of *England* are so tender of mens *Lives*, that no one can suffer *Death* but by the averment of twice twelve men, that he committed such a *Fact* for which that Punishment is awarded, and therefore however of late (for the advancement of Power by depriving men of half that safety which the Law gives them) it hath been given in *Charge* to *Grand-Juries* to find upon a probable Evidence, and always the highest Offence, because it may be lessened at a *Trial*, where 'tis expected the influence of a *Court* should be great enough to hang or save, according to *Directions*; Yet let every true *Englishman*, when he serves upon this *Duty*, consider what care the *Law* takes in their returns, not only that they be *good* and *lawful* men; but that they be of the *Vicinage*, and so are presumed to have a clearer knowledge both of the nature of the *Fact*, *Credit* of the *Witnesses*, and *Reputation* of the *Party* accused, than any other persons tho' equally able and honest, yet not living within those limits can reasonably be imagined to have; For as my Lord Chief Justice *Vaughan* observes in *Bushell's Case*, They may have Evidence from their own *Personal Knowledge*,

by which they may be satisfied, and sometimes are, of the *incredibility* of the *Witnesses*; and as a *Jury* cannot discharge that Trust which the *Law* reposes in them, if they do not well weigh the *Credit* of their *Evidence* and all *Circumstances* relating to the *Fact*; so they cannot satisfy their Consciences if they shall deliver a *Verdict* otherwise than they believe: Therefore my Lord Chief Justice *Vaughan* in *Bushell's Case* p. 140. makes this one fault in that Return, *That the Jurors are not said to have acquitted the persons indicted against full and manifest Evidence, Corruptly, and knowing the said Evidence to be full and manifest against the Persons indicted*; for how manifest soever the *Evidence* was, if it were not so to *them*, and that they believed it *such*, it was so far from being a *Fault*, that it was their *Duty*, because sworn to give their *Verdict* according to the best of their knowledge; and they had been forsworn, at least in *foro Conscientie* to have done otherwise; so that according to the opinion of this great and learned *Judge*, a *Jury* must, and cannot otherwise be guided than by their *thoughts* of the *Evidence*. What a *Court* may call *clear and plain proof* (as they have done in the late and unusual way of examination of *Witnesses*) may appear far otherwise to them, and for reasons weighty and convincing; and whatever men may say or write yet since they cannot believe as they please, it is not in their power to alter their Judgment according to another's direction. So that there might be motives strong enough to induce the *E's.* of *S. Jury* to acquit him, though there had been as many more such witnesses, and had all as positively sworn the *Treason*, as those that appeared; as the consideration of the *Evidence* it self, how improbable *some* things were, and how irreconcilable *others* to common sense and belief; how infamous the *Witnesses* were, and what *applications* they had made to the *City* (and perhaps to some of them) for a subsistence, before they entred into this *Conspiracy*; the *State* of my *L. S.* as he stood in the way of *Papish* designs; and therefore necessary to be destroyed, and by no means so advantageous to their Cause, as under the colour of a *Protestant Plot* to be proved by *Papish Evidence*. How unlikely a *man* of his *Prudence* was to discover such a *Design* to persons that might betray, but could never give the least advantage to it; how

how fatal the *Kings Death* must needs be to a *man* of his *Fortune*, eminently irreconcilable to *Popery* and a *Popish Successor*: the *Jurors* might have under their consideration these or the like circumstances, and from them conclude, that such thorough and improbable *swearing* was not *gratis*; and upon the same reasons that such a party as would be at the charge of such and so many *Witnesses*, would not spare for Price, nor want opportunity to convey into his Closet the horrid Paper that was found there. It is worth consideration that every *Witness* comes to a *Grand-Jury* under the Obligation of this Oath, viz.

The Evidence that you shall give to the Grand Inquest upon this Bill of Indictment, shall be the truth, the whole truth, and nothing but the truth: so help you God.

So that hearing all that can be said against the *Prisoner*, it were very unreasonable if they should not be so tender of his life, as not to hazard it at a further *Trial*, if what is said on one side be not to them sufficiently convictive; and how can a conscientious *Juror* aver that upon his Oath, the truth whereof he is not satisfied in his Judgment? For the form of their presentment runs thus, *The Jurors upon their Oaths do present, that A.B. is guilty of Treason, Murder, or Felony*; for they must upon their Oaths aver the *Fact* as well as the *Subsequent Jury*, (or else the *Prisoner* can never be *Convicted*) and therefore ought to be as careful in their *Verdicts*, and not find a *Bill* upon that *Evidence* tho' of the *Grand Jury*, which they would not upon the same *Evidence* find if of the other, the *Prisoner* no way defeating it upon his *Trial*. Of what esteem *Grand-Juries* were in former times in the *Trial* of mens lives, (how insignificant soever some would render them now, by directing them to find in *Course* and *Form*) may be easily collected from the *Statute 3 H. 8. Chap. 12*. Which though cited upon all occasions to justify the Authority in altering of *Panels*, yet the reason is not observed why that power of reforming was so intrusted; the words are these: *Whereas great oppressions have been within most parts of England by the subtilty and undue demeanour of Sheriffs by making and returning for the body of the shires at every Sessions the names of such persons who for the benefit of such Sheriffs will be wilfully sworn at the solicitation of such Sheriffs and their ministers; By reason whereof many and divers substantial persons, the Kings true Subjects, contrary to equity and right, have divers and many times wrongfully been Indicted of divers Murthers, Felonies, and other misbehaviours by their covin and falsehood, to the utter undoing of their lives, loss of their goods and lands.* By the *Preamble* of this *Act*, 'tis plain that this power of *Reforming* was given to no other intent, than that the *Subject* might have honest *Grand-Juries*, men of such integrity and understanding, as will neither be corrupted nor frightened into a false averment of any *Indictment*, and thereby put the *Prisoner* in hazard of his life at a farther *Trial*; which was the only crime of which those *Grand-Juries* so corruptly returned could be guilty; for they could do no more than find the *Indictment* as it was brought to them, and the *Prisoner* must afterwards come upon another *Trial*, and before *Justices* too, to make his defence. And yet the *Statute* saith, *these Indictments have been to the utter undoing of the lives and fortunes of divers substantial persons, the Kings true Subjects*, especially when found

course in that manner and form as they are sent to them; which *Jurors* ought particularly to consider in this age, where violent prosecutions are so frequent, and many undone by great fines upon hasty expressions, (or perhaps pleased with the *Libels* of the age, and having no other malice to the Government than reading the *Wits* of the *Phamphlets*, are made the *Publishers*, that they may be *Fined* to their ruine, if they prove not persons of a conscience like these Gentlemen, fully complying to every thing in fashion) lest by a common rumour they mistake that for form which is the essential part of every *Indictment*, and the consideration thereof absolutely necessary in their giving a *Verdict*, because the safety or destruction of the *Prisoner* depends as much upon their finding his *Intention*, as his *Fact*: For all *Indictments* in capital Cases, must be laid *Feloniously, Traiterously, Maliciously, Seditiously*, with intention to raise discord between the King and his People, or in such like expressions declaring the intention of the offender. The *Bill* thus drawn, the *Prosecutor* looks no farther than the proving those *Words* or *Actions* to which that malice is so affixed. Now if a *Jury* affirms the *Indictment* thus formed as hath been the common course, then indeed the *Party* is in *Law* supposed *Guilty* of all the *Malice*, as it is there asserted, not that the *Law* presumes the *Malice* (as of late hath been too much insinuated into *Juries* but because the *Jurors* upon their Oaths do find the *Fact* committed with such *Malicious Intentions*; for a cunning *Clerk*, or learned *Attorney General*, may with his additions so dress up an ordinary *Trespass*, as to look like a formidable *Treason*, and bring a man in question for his *Life* upon the most trifling offence, if a wise discerning *Jury* shall not think fit to take off the *Varnish*, and find the true naked *fact* as it shall appear to them.

In the great contested case of *Barnardiston* and the *Sheriff* of *Suffolk*, if the *Jury* had found only a false *Return*, and not found it to be done *Maliciously and knowingly*, as was asserted in the *Declaration*, who can believe that my *Lord Chief Justice Hale*, and his then learned brethren in the *Kings Bench*, would have given *Judgment* for the *Plaintiff*; the knowledge and malice of the *Defendant* so found by the *Jury*, was the ground of that *Judgment*. As in the case of *Pen and Mead*, who being Indicted for certain *Trespases* and *Contempts*, unlawful *Assemblies* and *Tumults*, to the disturbance of the *Peace*, their *Intention* appearing otherwise, were justly acquitted; for though the *Evidence* was very plain that they with a great number besides were met together, yet the *Jurors* being upon their Oaths convinced That meeting of theirs was not with any *Intention* to raise *Tumults*, or disturb the *Peace*, as was charged upon it in the *Indictment*, could not bring them in *Guilty*. And for want of this careful distinguishing in *Juries*, we shall in a little time (if *London* preserves its *Charter*, have the *Apprentices Riots* in the *Easter* holy-days when they go to pull down a *Bawdy-house*, made a new *Treason*, by the only addition of the word *Traiterously* to this accustomed riotous offence; and nothing shall for ever hereafter be a *Riot* (although our *Old Laws* have known some great tumults to be no more) when a vigorous *Attorney General* shall think fit to call it *Treason*.